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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 1.420(f)	)	MM Docket No. 95-110
of the Commission's Rules	)	
Concerning Automatic Stay of	)	
Certain Allocation Orders	)	

To: The Commission

COMMENTS OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION

The Federal Communications Bar Association ("FCBA") submits the following comments in support of the Commission's Notice of Proposed Rule Making, 10 FCC Rcd 7753 (1995) ("NPRM"), proposing to remove the automatic stay provision of Section 1.420(f). The FCBA is a District of Columbia, non-profit, non-stock corporation whose chartered purpose is "to promote the proper administration of the federal laws relating to wire and radio communications."[1/] The FCBA has been active in commenting in a number of FCC proceedings, particularly involving procedural issues which would improve the practice of law

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1/ The FCBA has voting membership of approximately 2,200 lawyers involved in the communications law practice. As with any association, the views expressed herein do not necessarily represent the views of each and every member of the FCBA. Moreover, although FCC employees are FCBA members and represented on its Executive Committee, those members did not participate in the preparation or approval of these comments.

before the Commission. As the proposals made in this proceeding will improve Commission procedures, these comments are being submitted

1. Section 1.420 governs the procedures for the amendment of the FM and TV Tables of Allotments. Paragraph (f) of Section 1.420 provides, in pertinent part, that

> [t]he filing of a petition for reconsideration of an order modifying an authorization to specify operation on a different channel shall stay the effect of a change in the rules pending action on the petition.[2/]

Thus, Section 1.420(f) prohibits "licensees from constructing modified facilities authorized by the Commission until final resolution of any outstanding petition for reconsideration or application for review, or until the stay is lifted." NPRM at ¶ 6.

2. The NPRM proposes to eliminate the automatic stay in prospective cases and to lift the stay with respect to pending petitions for reconsideration or applications for review as of the effective date of the Report and Order in this proceeding. The Commission states that in its experience the automatic stay provision of Section 1.420(f) has had the unfortunate effect of inviting meritless petitions for reconsideration of orders amending the FM or TV Tables of Allotments where an existing authorization is modified to specify a different frequency. Id. Knowing that a petition for reconsideration will delay the implementation of a Commission allocation order, parties may file such petitions against their competitors for the sole purpose of causing such a delay. Because so few of the petitions are actually granted, see NPRM at ¶ 6, it is quite clear that many would not be filed, as the Commission recognizes, if

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2/ Although the language of the rule refers to a different channel, the rule has also been applied to modification of authorizations on the same channel at a higher class.

they could not "forestall installation of new competitive service." Id. Instead of providing an incentive for the filing of petitions that delay improved service to the public, the Commission's rules should deter meritless filings that waste the Commission's resources. In another context, the Commission previously expressed its concern "that FM and TV channel allotment proceedings may also be prone to abuse." Amendment of Sections 1.420 and 73.3584 of the Commission's Rules, 5 FCC Rcd 3911, 3914 (1990). That same concern applies to the adoption of the proposals set forth in the NPRM.

3. Moreover, adoption of the Commission's proposals would not undermine the purpose of the automatic stay provision -- to "ensure that affected parties have the opportunity to comment before proposed modifications to their authorizations become effective." NPRM at ¶ 5. Elimination of the automatic stay would not delete the requirement that interested parties be informed of actions affecting their interests, nor would challenges to allocation orders be affected. The only difference resulting from the proposed elimination of the automatic stay in Section 1.420(f) would be that licensees could proceed to construct and operate new facilities upon the adoption and release of allocation orders, at their own risk, pending final determination by the Commission of the merits of any appeal.

4. The licensee or permittee could decide whether or not to implement its improved service based on the risk of an adverse ruling on reconsideration or review under the following circumstances. In allocation decisions, the ordering clauses typically require a station seeking an upgrade to file its minor change application on Form 301 within 90 days of the effective date. After reviewing a petition for reconsideration or application for review, the

station should have the option to file or not file the Form 301 application based on the licensee's or permittee's own assessment of the risks involved. If the station wishes to file the Form 301, the Commission can process the application and impose a condition on the grant subject to the outcome of the reconsideration or review. Construction of the facility and issuance of the license would also be made subject to the ultimate outcome of reconsideration or review.

5. On the other hand, if the station chooses not to apply (and thus not to risk the non-refundable rule making and application fees totalling $2,450 under current rates), the station should be able to await the outcome of the reconsideration or review. The Commission could accommodate this option by amending its ordering clause to state that the application must be filed within 90 days after the effective date unless a timely petition for reconsideration or application for review is filed, in which case the station can file at its own risk, or can wait until resolution of the appeal before filing the Form 301 application.

6. Where a substitute channel is assigned for an existing station at the request of another station, the petitioning party and the public should still be able to realize the benefits of the Commission's action. The petitioning party should have the option to enter into an agreement for reimbursement of expenses incurred by the affected licensee for the change of channels. Such an agreement would also provide for reimbursement of the costs of switching the affected station back to its old channel in the event reconsideration or review is granted. In the alternative, the petitioning party could decide that it would rather wait until the reconsideration or review is concluded before seeking to implement the benefits of the action

it requested. The ability to choose between these options is not available currently due to the automatic nature of the stay.

7. As the Commission recognizes, it can entertain a request for stay under Section 1.102(b), 1.106(n) or 1.115(h) in a particular case or impose a stay on its own motion where warranted. These rules provide sufficient protections to those dissatisfied with the outcome of a rulemaking proceeding in the few extraordinary cases that might arise. Moreover, the Commission's proposal would also bring Section 1.420 in line with other rules regarding stays of Commission orders or decisions. Section 1.106(n) of the Commission's rules provides for stay of a Commission decision, order or requirement only upon a showing of good cause, as does Section 1.429(k) with respect to rulemaking proceedings. Thus, for example, an assignee or transferee of a station may consummate a transaction even where a petition for reconsideration has been filed challenging the Commission's consent. Of course, such consummation is made at the risk that the Commission will reverse its grant and force the parties to unwind. Similar treatment should be afforded to a licensee or permittee whose authorization has been modified to specify operation on a different channel and who wishes to construct and operate at the risk of an adverse final decision.

8. Another example of the current lack of consistency in the rules can be seen on an examination of Commission policies with respect to construction permits for the minor modification of station facilities. Such modifications involve power or antenna height increases or transmitter site changes, and are now permissible at a station's own risk even if a petition for reconsideration or application for review of the construction permit grant is filed.

The risk can be as great or greater in constructing at a new site or in building a new, taller tower as in simply changing channels, and reimbursing another station for the change in channel, following a rulemaking proceeding. In fact, through a minor change application using the "one-step" procedure, a party can change the channel and/or class of its station after the grant of its construction permit, receiving almost exactly the same type of benefit received by a rulemaking applicant, and incurring the same magnitude of cost in implementing the changes allowed by the Commission action. While the upgrade granted pursuant to a one-step application can be implemented even after the filing of a petition for reconsideration, the upgrade granted following a rulemaking proceeding cannot be so implemented under the current rules. Thus, Section 1.420(f) is inconsistent with the policies applied to minor modifications. Given the particularly low rate of success of petitions for reconsideration or applications for review of allocation orders, there is no justification for this disparate treatment.

9. The FCBA strongly supports the elimination of the automatic stay with respect to pending petitions for reconsideration or applications for review. The benefits of the rule change should apply to existing cases as well so that the improved service to the public can be expedited. Such goals are not served by retaining the stay in any form. Nor would petitioners filing for reconsideration or review be prejudiced, for their appeals would still be treated by the Commission on the merits. The Commission would also retain the authority to impose stays in individual cases where good cause showings have been made.

10. In short, the FCBA supports the elimination of the rule because it delays service to the public and encourages the filing of appeals solely for the purpose of delay, thereby wasting the resources of the Commission and of licensees trying to improve their service. Since stations able to benefit from the rule change would do so at their own risk, there is no public interest tradeoff involved in this proposed change. Thus, the proposed elimination of this section of the rules serves the public interest and should be adopted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Denise Sullivan, hereby certify that I have this 28th day of August, 1995, caused a copy of the foregoing **"COMMENTS OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION"** to be hand delivered to the following:

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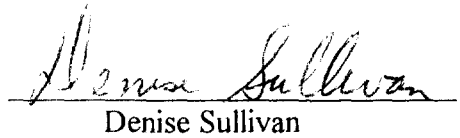

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